91-360

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether post-judgment interest under 28 U.S.C. § 1961 on an attorneys' fees award should run from the date the prevailing party is deemed to be entitled to a statutory fee award or from the date when the amount of fees is quantified?

LIST OF PARTIES

Petitioners:

State of Missouri, the Honorable John Ashcroft, Governor, the Honorable Wendell Bailey, Treasurer, Dr. Robert E. Bartman, Commissioner of Education, and the Missouri State Board of Education and its members, Thomas R. Davis (Presiding), Roseanne Bentley, the Rev. Raymond McCallister, Jr., Susan D. Finke, Gary D. Cunningham, Rebecca M. Cook and Sharon M. Williams.

Respondents:

Kalima Jenkins, et al., a class consisting of all present and future elementary and secondary education students in the School District of Kansas City, Missouri

The School District of Kansas City, Missouri, its Board of Directors, and its Superintendent, Dr. Walter L. Marks

The American Federation of Teachers, Local 691

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Statute:

28 U.S.C. § 1961 ..... *passim*

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MISSOURI, et al.,
Petitioners,

VS.

KALIMA JENKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the accompanying judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 931 F.2d 1273 and is reprinted at pages A-3 to A-13 of the accompanying appendix to this petition. The order of the District Court is reported at 731 F. Supp. 1437 and is set forth in the accompanying appendix at pages A-33 to A-40. Other unreported orders of the District Court which are relevant to this appeal are reprinted in the accompanying appendix at pages A-14 through A-32.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1991. On July 16, 1991, Mr. Justice Blackmun granted an extension of time in which to file this petition until August 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is 28 U.S.C. § 1961(a) which provides in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment . . .

STATEMENT OF THE CASE

The lawsuit giving rise to the cause of action underlying the attorney's fees proceeding in this case was originally filed in 1977 by the Kansas City, Missouri School District ("KCMSD") and certain plaintiffs, alleging claims of interdistrict segregation and seeking broad and sweeping relief.[1] In 1978, KCMSD was realigned as a defendant. *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978), *appeal dism'd*, 592 F.2d 493 (8th Cir. 1979). An amended complaint was filed by a class of schoolchildren, who

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[1] The State of Missouri recently filed a petition for certiorari, seeking review of separate issues pertaining to the remedies ordered in this case. See *Missouri v. Jenkins*, No. 91-____, filed August 21, 1991.

were later certified as the Jenkins class. Arthur A. Benson, II entered his appearance on behalf of the class on March 15, 1979. The case proceeded through discovery and trial, with most of the hours billed in the 1981-84 period. The NAACP Legal Defense Fund ("LDF") entered their appearance in the case on May 27, 1982 and provided additional representation to the Jenkins plaintiffs. On September 17, 1984, the Jenkins plaintiffs prevailed, in part, on their liability claims. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984), *aff'd*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S 816 (1987). At that time, the district court found liability for intradistrict segregation on the part of the KCMSD and the State. The case then proceeded through the remedial phase.

The attorney's fees proceedings went forward on a different track from the remedial issues presented by the underlying cause of action. Plaintiffs filed their initial fee petitions on February 5, 1986, and filed subsequent motions later. The district court first indicated that the Plaintiffs were entitled to some measure of attorney's fees on February 24, 1986, Pet. App. A-14, but it did not establish the amount of "overall fees" to be awarded the Plaintiffs for the liability phase and the first part of the remedy phase at that time. Rather, the February 24, 1986 order merely required an interim payment of $200,000 to Plaintiffs' counsel Benson. *Id.*

The fee issues were briefed and a hearing on those issues was held on February 27, 1987. Thereafter, the district court quantified the fee award for the liability phase of the proceedings and the first part of the remedy phase in its order issued on May 11, 1987, Pet. App. A-16, an order modified on July 14, 1987. In total, the district court awarded Benson $1,728,567.92 and the LDF $2,365,875.24.[2]

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[2] Benson had originally requested $3,700,010.30 and the LDF had requested $3,170,600.20. Pet. App. A-16.

Plaintiffs and the State both pursued appeals of the district court's May 11, 1987 decision. The district court's decision was affirmed in all respects by the Eighth Circuit in *Jenkins v. Missouri*, 838 F.2d 260 (8th Cir. 1988). Both the Plaintiffs and the State then filed petitions for writs of certiorari. Plaintiffs' petition was denied, 488 U.S. 889 (1988), while the State's was granted in part, 488 U.S. 888 (1988). This Court thereafter affirmed the Eighth Circuit's decision. *Missouri v. Jenkins*, 491 U.S. 274 (1989).[3]

While the fee litigation was pending the State made numerous partial payments to both Benson and the LDF. After this Court's decision was handed down, the State paid Plaintiffs the balance of the principal of the fees judgment, along with post-judgment interest calculated from May 11, 1987, the date of the district court's ruling quantifying the fees to be awarded to the prevailing party.

The proceedings that are the subject of this petition followed, beginning with the filing of the Plaintiffs' Motion for Award of Post-Judgment Interest. Plaintiffs' motion requested post-judgment interest from February 24, 1986 and requested, in the alternative, that the court grant pre-judgment interest. After further pleadings were filed on this issue, the district court granted the Plaintiffs post-judgment interest from February 24, 1986. The State appealed, and the Eighth Circuit affirmed the district court's order.

In affirming the district court's judgment that post-judgment interest under 28 U.S.C. § 1961(a) was to accrue from the date when the court first determined the class was entitled to some fee award rather than the date when it quantified the fees, the Eighth Circuit acknowledged the Seventh Circuit's contrary opinion in

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[3] This case has also been before the court on the issue of taxation beyond State law limits. *Missouri v. Jenkins*, ___ U.S. ___, 110 S. Ct. 1651 (1990).

Fleming v. County of Kane, 898 F.2d 553 (7th Cir. 1990) and agreed that it "lends some support" to the position it was rejecting. Pet. App. at A-8, n.3. The court maintained, however, that the *Fleming* decision did not explain why it was awarding post-judgment interest from the date of quantification rather than the date of entitlement, and it questioned whether the parties presented that issue to the *Fleming* court. Pet. App. at A-7. The Eighth Circuit then noted with approval the decisions of the Fifth and Federal Circuits awarding post-judgment interest as of the date the right to some fee award was first recognized, Pet. App. at A-7, *citing Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983) (*per curiam*), and reasoned that the accrual of post-judgment interest as of the date of entitlement would serve the general purposes fostered by the statutory award of attorneys' fees. Pet. App. at A-9 - A-10.

In a concurring opinion, Chief Judge Lay disagreed with the majority's rationale. In Chief Judge Lay's view, the Fifth Circuit opinion in *Copper Liquor* was not germane, as that case involved an award of fees under the Sherman Act, 15 U.S.C. §§ 1, 15 (1988), pursuant to which attorneys' fees were recognized as a matter of right rather than as an element of the district court's discretion. Pet. App. at A-11 (Lay, J., concurring). In Chief Judge Lay's view, however, the determinative factor was that the district court entered a *final judgment* when it issued its order establishing the plaintiffs' entitlement to fees and requiring an interim payment of $200,000. Pet. App. at A-12. It is not clear from the concurring opinion whether Chief Judge Lay regarded the quantifiability of the fee award to be a significant consideration, but he did indicate he thought the award was "readily ascertainable by mathematical computation or other recognized standards," as of the February 24, 1986 Order. Pet. App. A-12.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict between the Eighth Circuit's opinion and the interpretations reflected by the recent decisions of the United States Court of Appeals for the Seventh Circuit in *Fleming v. County of Kane, supra*, and the earlier decision of the Ninth Circuit in *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 675 (9th Cir. 1973). Not only is the grant of certiorari necessary and appropriate to address this conflict among the circuits, the Court's review of the *Jenkins* case is necessary to reconcile the Eighth Circuit's interpretation of the statutory post-judgment interest provision of 28 U.S.C. § 1961(a) with the principles established in this Court's decision in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, ___ U.S. ___, 110 S. Ct. 1570 (1990). Unless resolved by this Court, the conflicting interpretations among the federal courts of appeal will continue to generate applications that are inconsistent with one another and with the congressional intent in enacting the post-judgment interest statute, as reflected in this Court's *Bonjorno* decision.

While recognizing that *Fleming* lent support to the position it proceeded to reject, the Eighth Circuit questioned whether the *Fleming* court had clearly been presented the question. Pet. App. at A-7. An examination of *Fleming* dispels any such questions, however. The Fleming court plainly considered the operative date of the post-judgment interest statute to be an issue, and it clearly held that "plaintiffs may collect interest on attorneys' fees or costs only from the date that the award was entered," by which it referred to the date the award was quantified. *Fleming*, 898 F.2d at 565, *quoting Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 656, 662 (7th Cir. 1985).[4] In *Fleming*,

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[4] The Seventh Circuit also cited its earlier decision in *Harris v. Chicago Great Western Railway*, 197 F.2d 829, 836 (7th Cir. 1952) (noting that interest is to be awarded only after the fees obligation is "authoritatively defined.")

the district court entered a memorandum opinion and order, dated April 12, 1988, in which it ruled that "plaintiff was entitled to attorney's fees under § 1988, but did not rule on the exact amount to be awarded." *Id.* at 562. After additional proceedings and a hearing, the Court entered a minute order on June 23, 1988 awarding plaintiffs $205,176.80 as attorney's fees and costs. Apparently, judgment was entered the next day, June 24, 1988. *Id.* at 565. It was this final date of June 24, 1988 from which the Seventh Circuit held that interest under § 1961(a) would begin to run. The rationale for this holding was stated clearly. "Prior to the date the judgment on attorney's fees was entered, plaintiff's attorneys' claim for unpaid attorney's fees was unliquidated and, as such, not entitled to interest." *Id.*

Moreover, as an examination of the cases cited in the instant *Jenkins* decision and the Seventh Circuit's competing result and rationale in *Fleming* will confirm, other circuits are divided on this question as well. As noted above, the Fifth and Federal Circuits appear to adopt the same rule as that announced in *Jenkins* and thus hold that a prevailing party's entitlement to post-judgment interest on a fee award accrues at the time the party has been deemed entitled to receive a fee award rather than the time the award is quantified. The Ninth Circuit, by contrast, holds that interest only accrues when the attorneys' fee award is reduced to a quantified judgment. See *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 675 (9th Cir. 1973).

The State submits, and *Bonjorno* confirms, that the date of the judgment quantifying a fee award is the appropriate date for the commencement of the accrual of post-judgment interest. Prior to that time, it is impossible to apply the statute and make a calculation of interest in a Section 1988 case in order to allow the paying party to know the extent of its obligation.[5]

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[5] As such, Chief Judge Lay's concurring opinion rests on an incorrect premise. Chief Judge Lay apparently believed that the attorneys' fees award

(Footnote 5 continued on next page)

In *Bonjorno*, the Court was unanimous in holding that the appropriate date from which interest should be calculated on a damage award under the antitrust laws is the date of the judgment and not the date of the verdict. *Id.* at 1576. The date of the verdict/date of the judgment distinction is comparable to the distinction between the date that the right to some attorney's fees is recognized and the date the fee award is quantified. The date of the verdict will often be prior to the date of the judgment, but despite the fact that the party may obtain a damage verdict in a large amount, interest will not begin to run on the damages until the Court enters judgment, regardless of how long the period between judgment and verdict is. However, as this Court pointed out:

> Even though denial of interest from verdict to judgment may result in the plaintiff bearing the burden of the loss of the use of the money from verdict to judgment, the allocation of the costs accruing from litigation is a matter for the legislature, not the courts. [Citation omitted].

Id. at 1576. Similarly, a holding that a party is entitled to attorney's fees is different from a judgment requiring that the party be paid a specific amount of fees. Until the fee award is quantified, the losing party has not been required to do something on pain of the prevailing party executing on the judgment, because there is no judgment to execute on.

(Footnote 5 Continued)

was liquidated as of the time of the February 24, 1986 Order, as he indicated that "[t]he total sum is readily ascertainable by mathematical computation or other recognized standards". Pet. App. A-12. However, the facts of this case refute that contention. As indicated, supra, Note 2, Benson initially sought $3,700.010.30 and the LDF sought $3,170.600.20. Pet. App. A-16. They were awarded significantly less than those amounts. Pet. App. at A-16.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1534

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, By his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan Blackwell
Gary M. Cunningham
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia R. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof.

77-420-CV-W-4
Appeal from the United States District Court
for the Western District of Missouri.

Filed: May 23, 1991

JUDGMENT

This appeal from the United States District was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 29, 1991

A true copy.

ATTEST: /s/ Michael E. Gans, Acting Clerk

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

MANDATE ISSUED 5/21/91

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 90-1534

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan Blackwell
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Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education

Robert E. Bartman, Commissioner of Education
of the State of Missouri,

Appellants.

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 12, 1990
Filed: April 29, 1991

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The State of Missouri appeals from an order of the district court[1] holding that the Jenkins class is entitled to post-judgment interest on its attorneys' fees accruing from the date when the court first determined that the class was entitled to an award of attorneys' fees, rather than the date when the court quantified the fees. *Jenkins v. Missouri*, 731 F. Supp. 1437, 1440-41 (W.D. Mo. 1990). The district court thus held that post-judgment interest should accrue from February 24, 1986, the date on which it determined entitlement to the fees. *Id.* at 1441. The State argues that the accrual should not begin until May 11, 1987, the date when the district court quantified the fees. We affirm the order of the district court.

This action for post-judgment interest on attorneys' fees has its origins in the 1977 lawsuit that challenged segregation in the

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[1] The Honorable RUSSELL G. CLARK, United States District Judge for the Western District of Missouri.

Kansas City, Missouri, School District. Arthur A. Benson, II, entered his appearance on behalf of the plaintiffs in March 1979, and the NAACP Legal Defense Fund entered as co-counsel in March 1982. Following a three-month bench trial, the district court in September 1984 held the State defendants and the KCMSD liable for intradistrict segregation. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1505-06 (W.D. Mo. 1984). In June 1985, after a two-week hearing on remedies, the district court entered judgment on the merits, ordering $87 million in capital improvements and operating programs. *Jenkins v. Missouri*, 639 F. Supp. 19, 43-44 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657, 662 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).

On February 5, 1986, the Jenkins class filed application for attorneys' fees under The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1988). On February 24, 1986, the district court found that "[c]learly under the law, counsel for plaintiffs are entitled to an award of attorney's fees" and ordered the State to make an immediate partial payment of $200,000 to Benson. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 1-2 (W.D. Mo. Feb. 24, 1986). The State did not appeal this award, and it made three payments, totalling $347,332.93, to Benson during the litigation of the fees dispute in district court. In May and July of 1987, the district court entered two separate orders directing the State to pay Benson a total additional amount of $1,381,897.44 in attorneys' fees and expenses. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 16 (W.D. Mo. May 11, 1987); *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 2-3 (W.D. Mo. July 16, 1987). It also awarded the Legal Defense Fund $2,365,875.74 in fees and expenses. *Jenkins*, slip op. at 16 (May 11, 1987). This court and the Supreme Court affirmed the district court's order. *Jenkins v. Missouri*, 838 F.2d 260, 268 (8th Cir. 1988), *aff'd*, 109 S. Ct. 2463, 2472 (1989).

In December 1989, the Jenkins class filed a motion for post-judgment interest. The district court found that Benson and the

Legal Defense Fund were entitled to such interest from February 24, 1986, the date when it had first determined that the class was entitled to attorneys' fees, rather than from May 11, 1987, the date when the court had quantified the fees. *Jenkins*, 731 F. Supp. at 1438-40. The district court also held that interest should accrue at a rate of 7.71 percent, the U. S. Treasury Bill rate on February 24, 1986. *Id.* at 1441. *See also* 28 U.S.C. § 1961(a) (1988) (prescribing application of Treasury Bill rate).

The parties here agree that the Jenkins class is entitled to post-judgment interest on its attorney fee award under 28 U.S.C. § 1961(a), which states:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . . Such interest *shall be calculated from the date of the entry of the judgment*, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

(Emphasis added).

The phrase "any money judgment" in section 1961(a) is construed as including a judgment awarding attorneys' fees. *R.W.T. v. Dalton*, 712 F.2d 1225, 1234 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Spain v. Mountanos*, 690 F.2d 742, 747-48 (9th Cir. 1982). In *Dalton*, this court held that post-judgment interest on attorneys' fees was mandatory under section 1961(a) and that denial of such interest constituted reversible error. 712 F.2d at 1234-35.

With the entitlement to post-judgment interest clear, the parties' disagreement is confined to the meaning of the phrase "shall be calculated from the date of the entry of the judgment." The State contends that the proper construction of this language

establishes that the relevant date is when the fee award is quantified or "liquidated." The Jenkins class contends that the relevant date is when the prevailing party becomes unconditionally entited to fees, either because of a statutory right or because the court in its discretion has determined the party is entitled to attorneys' fees.

The district court concluded that all of the relevant authority supported the plaintiffs' position. 731 F. Supp. at 1438-40. After the district court issued its opinion, however, the Seventh Circuit decided *Fleming v. County of Kane*, 898 F.2d 553, 565 (7th Cir. 1990), which awarded the plaintiff post-judgment interest on his attorneys' fees from the date the fees were quantified. *Id.* at 565. The *Fleming* court did not explain why it selected the date of fee quantification rather than the date of fee entitlement, and it is not clear whether the parties presented this issue. *Fleming* reversed the district court's ruling that had awarded pre-judgment interest on the attorney's fees. The *Fleming* court explained: "Prior to the date the judgment on attorney's fees was entered, plaintiff's attorneys' claim for unpaid attorney's fees was unliquidated and, as such, not entitled to interest." *Id.* The court then concluded that the "award of attorney's fees was entered" on the date the fees were quantified. *Id.*

The *Fleming* result runs counter to the holdings of the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (per curiam), and the Federal Circuit in *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988). The *Copper Liquor* court prescribed a two-part test to determine when attorneys' fees should begin to accrue interest:

> If a judgment is rendered that does not mention the right to attorneys' fees, and the prevailing party is unconditionally entitled to such fees by statutory right, interest will accrue from the date of judgment. If, however, judgment is rendered without mention of attorneys' fees, and the allow-

> ance of fees is within the discretion of the court, interest will accrue only from the date the court recognizes the right to such fees in a judgment.

Id. at 545. Under either part of the *Copper Liquor* test, interest accrues from the date that the party becomes unconditionally entitled to fees, even if those fees are not yet quantified. *Id.* The *Mathis* court followed *Copper Liquor*, stating that "[i]nterest on an attorney fee award . . . runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum." 857 F.2d at 760. The Jenkins class contends that under *Copper Liquor* and *Mathis*, post-judgment interest should accrue from a date no later than February 24, 1986.[2]

The State argues that there is no need to apply *Copper Liquor* or *Mathis* because an Eighth Circuit case, *Dalton*, holds that post-judgment interest does not begin to accrue until the date when the fees are quantified.[3] In *Dalton*, the district court

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[2] Although the Jenkins class sought and was awarded post-judgment interest from February 24, 1986, the class maintains that under the first prong of *Copper Liquor* it is entitled to interest accruing from the June 14, 1985, judgment on the merits. *See Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987). As the Jenkins class does not actually seek interest accruing from the June 14, 1985, judgment, we need not decide this issue.

[3] The State, while relying primarily on *Dalton*, also argues that support for its argument can be found in *Fleming; Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985); *Perkins v. Standard Oil Co*, 487 F.2d 672, 675 (9th Cir. 1973); and *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570, 1575-76 (1990). We agree that *Fleming* lends some support to the State's position, but conclude that *Sun Ship, Institutionalized Juveniles, Perkins*, and *Bonjorno* do not address the issue before us.

granted summary judgment in favor of the plaintiffs on October 14, 1980. 712 F.2d at 1228. On March 30, 1982, it entered a final judgment awarding costs and fees to the plaintiffs. *Id.* Following the district court's denial of post-judgment interest on the attorneys' fees, this court reversed and held that post-judgment interest should accrue from the March 30, 1982, award of fees. *Id.* at 1234-35.

The State argues that *Dalton* stands for the proposition that post-judgment interest does not begin to accrue until the date when fees are quantified. We reject such a reading of *Dalton*, as did the district court. *Jenkins*, 731 F. Supp. at 1439. *Dalton* simply did not address the issue presented here. In *Dalton*, the district court apparently established the plaintiffs' right to fees on the same date as it quantified the fees. *Id.* The court therefore had no need to address the issue before us.

After considering the purposes underlying the award of post-judgment interest, we are convinced that *Copper Liquor* and *Mathis* establish the proper rule. In *Dalton*, we recognized the purposes that are furthered by the awarding of post-judgment interest on attorneys' fees:

> [A denial of post-judgment interest] would effectively reduce the judgment for attorneys' fees and costs, because a certain sum of money paid at a certain time in the future is worth less than the same sum of money paid today. Failing to allow awards of attorneys' fees to bear interest would give parties against whom such awards have been entered on artificial and undesirable incentive to appeal or otherwise delay payment.

Dalton, 712 F.2d at 1234-35. *See also Mathis*, 857 F.2d at 760 ("The provision for calculating interest from entry of judgment deters use of the appellate process by the judgment debtor solely as a means of prolonging its free use of money owed the judgment creditor"). The award of interest also serves the make-

whole objective of fee awards in civil rights cases. *Gates v. Collier*, 616 F.2d 1268, 1275-76 (5th Cir. 1980). *See generally* S. Rep. 94-1011, 94th Cong., 2d Sess. 2-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908-13 (discussing purposes of Civil Rights Attorney's Fees Award Act of 1976). We also observe that if the accrual of post-judgment interest is delayed until fee awards are quantified and attorneys are thus not fully compensated for their successful efforts, they may be reluctant to take on complex and expensive litigation.

The State argues that until the fee award is liquidated, the party responsible for payment has no way to satisfy its obligation, and thus, no interest should accrue. We are not persuaded by this argument. The fee-paying party suffers no prejudice from any delay in quantifying the award because it has the use of the money in the interim and because the statutory interest rate is tied to the U.S. Treasury Bill rate. *See* 28 U.S.C. § 1961(a).

Several of the district courts that have considered the issue of when post-judgment interest begins to accrue on attorneys' fees have applied the same approach used in *Copper Liquor* and *Mathis*. *See, e.g., Water Technologies Corp. v. Calco Ltd.*, 714 F. Supp. 899, 910 (N.D. Ill. 1989); *Proctor & Gamble Co. v. Weyerhaeuser Co.*, 711 F. Supp. 904, 908 (N.D. Ill. 1989); *Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp.*, 599 F. Supp. 509, 522-23 (S.D.N.Y. 1984); *Burston v. Commonwealth of Virginia*, 595 F. Supp. 644, 652 (E.D. Va. 1984). *But see Griffin v. Ozark County*, 688 F. Supp. 1372, 1377 (W.D. Mo. 1988) (post-judgment interest on attorneys' fees accrues from date of judgment quantifying fees); *McCullough v. Cady*, 640 F. Supp. 1012, 1028 (E.D. Mich. 1986) (dictum suggesting that post-judgment interest properly accrues from date of judgment quantifying attorneys' fees because the fee claim is unliquidated before that date).

Applying the second part of the *Copper Liquor* standard,[4] which states that interest will accrue from "the date the court recognizes the right to such fees in a judgment," we conclude that the Jenkins class is entitled to post-judgment interest on its attorneys' fees accruing from the February 24, 1986, order declaring the class's entitlement to those fees.

For the foregoing reasons, we affirm the judgment of the district court.

LAY, Chief Judge, concurring.

I concur in the award of post-judgment interest on the attorney's fees beginning on February 24, 1986. I must, however, disagree with the studied effort used by the majority in recognizing that award. The majority opinion relies on *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (per curiam). This case is not germane to our discussion and does not address the issue at hand. In *Copper Liquor*, the Fifth Circuit discussed an attorney's fee award under the Sherman Act, 15 U.S.C. §§ 1, 15 (1988). Under the antitrust laws the attorney's fee award was recognized as a matter of right under the applicable statutes. The interest on the award accrued from the date of the judgment because the prevailing party was unconditionally entitled to such fees by statute, even if the judgment did not mention the right to attorney's fees. *See Copper Liquor*, 701 F.2d at 545. In the present case, we are dealing with an award of attorney's fees under the Civil Rights Act, 42 U.S.C. § 1988 (1988). Under section 1988 attorney's fees are awarded, not as a matter of right, but as a matter of discretion by the trial court. *Id.*; *see White v. New Hampshire Dep't of Employment Sec.*, 455

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[4] As the Jenkins class has not sought post-judgment interest accruing from the June 1985 judgment on the merits, *see* footnote 2, we apply the second part of the *Copper Liquor* test.

U.S. 445, 454 (1982). The prevailing party is not entitled to post-judgment interest on an award for attorney's fees unless the court specifically enters such a judgment.

This case is relatively simple. The statutory provision governing post-judgment interest is found in 28 U.S.C. § 1961(a) (1988), which states in part that "[s]uch interest shall be calculated from the date of the entry of the judgment." In determining when the judgment is entered on an award of attorney's fees, Rule 58 of the Federal Rules of Civil Procedure provides in part that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Fed. R. Civ. P. 58. In the present case, the district court, on February 24, 1986, awarded a judgment under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). At that time the district court ordered that " 'counsel for plaintiffs are entitled to an award of attorney's fees' and ordered the state to make an immediate partial payment" of $200,000 to attorney Arthur Benson. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 1-2 (W.D. Mo. Feb. 26, 1986). This clearly constituted a final judgment under Rule 58.

Post-judgment interest on the final judgment began to run on the total judgment from the date of the judgment awarding the attorney's fees. The fact that the February 24 judgment contained only a partial sum for attorney's fees is immaterial. The total sum is readily ascertainable by mathematical computation or other recognized standards.[1] We need only look to Rule 58

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[1] As the Supreme Court has indicated, in an award for attorney's fees under section 1988, there can be several final judgments. *White*, 455 U.S. at 453.

and section 1961 to ascertain the date from which the post-judgment interest should run.[2]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[2] As pointed out in the majority opinion, the state urges that we should follow the Seventh Circuit decision in *Fleming v. County of Kane*, 898 F.2d 553 (7th Cir. 1990). In *Fleming*, the Seventh Circuit acknowledged that the final judgment did not occur until June 24, 1988. *Id.* at 565. Although the court recited that the district court had rendered a memorandum opinion and order on April 12, 1988, and a minute order on June 23, 1988, I submit the only reasonable conclusion is that the earlier opinions of the district court were not final judgments under Rule 58. Under the circumstances, the decision in *Fleming* is not supportive of any argument to the contrary. As the Supreme Court has observed, "it may be unclear even to counsel which orders are and which are not 'final judgments.' " *White*, 455 U.S. at 453. The purpose of Rule 58 was to obviate that confusion. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

FILED: FEB. 24, 1986

ORDER

On February 5, 1986, Mr. Arthur Benson, II, one of the attorneys for plaintiffs in the above-captioned case, moved for an allowance of attorney's fees and in addition asked for an immediate payment of $200,000.00, being only a very small percentage of the total fee requested. On February 11, 1986, the NAACP Legal Defense Fund, Inc. likewise filed a request for attorney's fees and asked for an immediate award of $280,000.00.

On February 20, 1986, the State defendants filed a response to the requests for an immediate award of attorney's fees and stated that they have no objection to the immediate allowance of attorney's fees to Mr. Benson in the amount of $200,000.00 but opposed the immediate award of $280,000.00 to the NAACP Legal Defense Fund. The State defendants also take the position that the attorney's fees should be borne equally by the State defendants and the KCMSD.

Clearly under the law, counsel for plaintiffs are entitled to an award of attorney's fees. Mr. Benson has made a very persuasive argument that an immediate award of $200,000.00 should be

made to him. It is not so clear that any immediate award should be made to the NAACP Legal Defense Fund.

Without making a determination as to whether the award of attorney's fees should be assessed against the State defendants as well as the KCMSD, the Court will not require KCMSD to participate in the payment of immediate fees being awarded to Mr. Benson. Therefore, it is hereby

ORDERED that Mr. Arthur Benson, II is entitled to an immediate award as partial payment of attorney's fees in the amount of $200,000.00 to be paid by the State defendants; and it is further

ORDERED that the immediate award of $280,000.00 in partial payment to the NAACP Legal Defense Fund, Inc. is presently denied without prejudice.

/s/ RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: February 24, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

FILED: MAY 11, 1987

ORDER

Several motions for awards of attorney's fees and expenses are presently before the Court. Plaintiffs' cou-counsel, Arthur Benson, has moved for $3,310.587.00 in fees and expenses for services rendered by him and his staff through June 30, 1986. The Court will award Mr. Benson and his staff $1,614,437.43 for these services. Having previously received $347,332.93 of this amount, the balance due Mr. Benson for these services is $1,267,104.50. In addition, Benson has requested $72,702.49 in fees and expenses incurred in litigating his fee application. The Court will award this amount. The Legal Defense Fund (LDF), co-counsel for the plaintiffs in this case, moved the Court for $3,170,600.20 in fees and expenses for services rendered through May 31, 1985. The Court will award the LDF $2,323,730.60 for these services. In addition, the LDF seeks $65,411.64 in fees and expenses incurred in pursuing its fee application. The Court will award the LDF $42,145.14 for such services. The State of Missouri defendants will be solely liable for the fees and expenses awarded by the Court. Co-defendant KCMSD has moved the Court for $1,298,198.70 in attorney's fees and litigation

expenses for services rendered through June 30, 1986. This motion will be denied. Intervenor Kansas City Missouri Federation of Teachers Local 691 moved the Court for $62,169.37 in attorney's fees and expenses incurred through March 1, 1987. This motion will be denied.

BENSON AND STAFF

Pursuant to 42 U.S.C. § 1988, the Court may allow the prevailing parties in this suit a reasonable fee as part of the costs. However, the plaintiffs in this case may only be considered prevailing parties for attorney's fees purposes if they succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *quoting Nadeau v. Helegemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The plaintiffs in this action are undisputedly "prevailing parties" because this Court found in favor of the plaintiffs on their liability claims against the State of Missouri defendants and the KCMSD. *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984).

The first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Mr. Benson acknowledges that under *Henlsey v. Eckerhart*, 461 U.S. 424 (1983), he and his staff cannot receive compensation for all their time spent on this litigation since the plaintiffs were not successful in their claims against the suburban school districts, the Kansas defendants, and the federal defendants. Accordingly, Mr. Benson excluded from the total time expended by him and his staff approximately 353 hours which he claims was clearly allocable to work done on the unsuccessful claims against these other defendants. The State argues that Benson and his staff failed to exclude additional hours that were expended solely on the unsuccessful claims.

Contrary to the contentions of the State of Missouri, the Court finds that the specific exclusions made by Benson and his staff accurately represent the time allocable to unsuccessful claims in the litigation, and which was "distinct in all respects" from time spent on their successful claims. *Hensley v. Eckerhart*, 461 U.S. at 440.

The State also argues that the remaining time should be reduced by 50% because the plaintiffs were unsuccessful on their claim of interdistrict liability against the State and various other defendants. The Court finds that these remaining hours either related solely to the successful claims made by the plaintiffs against the State and the KCMSD or were so closely interrelated among the remaining claims that they cannot be separated or reduced by some arbitrary percentage.

Finally, the State also requests an additional reduction of 5% for alleged duplication of effort. The State argues that because the plaintiffs utilized thirteen attorneys and numerous staff personnel in this case that there was "inevitably" some duplication of effort. Having examined the time records submitted by Benson and his staff, the Court finds no such duplication. Retention of numerous attorneys and a large staff in this lengthy and complicated school desegregation case is certainly understandable and is not in itself a ground for reducing the hours claimed. *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983).

For the reasons stated, the Court finds the hours submitted by Mr. Benson and his staff represent the time reasonably expended on this litigation.

The next step in arriving at reasonable attorney's fees is the determination of a reasonable hourly rate. In making such a determination, the Court has carefully considered the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) that have been adopted

by the Eighth Circuit. E.g., *Hardman v. Board of Education of Dollarway, Arkansas*, 714 F.2d 823, 825 (8th Cir. 1983). Among these factors are the customary fee of the attorney and his experience, reputation and ability. The Court finds that Mr. Benson does not regularly charge an hourly rate in his civil rights practice. Therefore, the Court must consider the current Kansas City, Missouri hourly rate for attorneys with the litigation experience and expertise comparable to that of Mr. Benson.

It is undisputed that Mr. Benson is an experienced trial attorney who is widely recognized as a highly qualified civil rights attorney in the Kansas City, Missouri area. Based on the evidence presented to the Court, the Court finds that the hourly rates for Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125.00 to $175.00 per hour. The Court finds that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights.

Two additional *Johnson* factors are particularly applicable in this case, i.e., the preclusion of other employment by the attorney due to acceptance of a case, and the undesirability of a case. The Court finds that from early 1983 until the end of 1985 Benson devoted nearly all of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

The undesirability of this case should also be considered in determining Benson's reasonable hourly fee. Undeniably, this case has been very unpopular with many Missouri citizens as evidenced by various statements, editorials, articles and letters from parents, taxpayers and state officials.

In addition, the Court has considered delay in payment, a factor not listed in *Johnson*, in determining a reasonable attorney's

fee for Benson's services. Mr. Benson's application is for services rendered from March, 1979 through June 30, 1986. It is essential that his hourly rate include compensation for the delay in payment *Jorstad v. IDS Realty Trust*, 643 F.2d 1305 (8th Cir. 1981).

Accordingly, having carefully considered the twelve factors set forth in *Johnson*, and the additional factor of delay in payment, the Court finds that a reasonable hourly rate for Mr. Benson's services from 1979 through June 30, 1986, is $200.00 per hour. This rate, multiplied by the number of hours reasonably expended by Mr. Benson on the litigation, results in an attorney's fee of $1,004,160.00. The Court will award Mr. Benson this amount for attorney's fees for services rendered through June 30, 1986.

Mr. Benson had requested an hourly rate of $125.00 an hour which when multiplied by his reasonable hours expended totals $627,600.00. However, he also requested additional awards of $370,042.00 for "quality of representation" and $1,135,800.00 for the "risk of nonpayment," creating a total fee request for his services of approximately $2.1 Million Dollars.

The Court finds that Benson's request is improper because under *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984) the "quality of representation," along with the "novelty and complexity of the issues," "the special skill and expertise of counsel," and the "results obtained" from the litigation are presumably fully reflected in the product of the reasonable hours and a reasonably hourly rate, and thus cannot serve as an independent basis for increasing the basic fee award. In the present case, the quality of Benson's representation as well as the other factors mentioned above, are fully reflected in the $1,004,160.00 fee calculated by the Court.

The Court is aware that an upward adjustment is permissible in the rare case where the fee applicant offers specific evidence

to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rate charged and that the success was exceptional. *Blum v. Stenson*, 465 U.S. at 899. However, while Mr. Benson certainly provided quality representation in this case, the Court does not find that this is the "rare case" which warrants an upward adjustment.

The question of upward adjustment based on the risk of loss, or as described by the plaintiffs, risk of nonpayment, was left open in *Blum b. Stenson, supra.* However in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, No. 85-5, slip op. at 20-21 (July 2, 1986), the Supreme Court reset the case for argument on that particular issue. To date, no such opinion has been rendered. Notwithstanding, the Court finds that the plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment very slight, because the State had mandated segregated schools for black and white children prior to 1954 and had failed to take any affirmative steps to eliminate the unlawful segregation after 1954. This small risk of nonpayment is fully reflected in the reasonable attorney's fee calculated by the Court.

Benson also requests a fee award for the services of four attorneys whom he employed to assist him in the litigation of this case. Two of these attorneys, Ms. Burkdoll and Ms. Goering, were associates of Mr. Benson and billed 97% of the hours submitted by these four attorneys on the fee application. Mr. Benson requests an hourly rate of $80.00 per hour for Ms. Burkdoll and Ms. Goering. The evidence presented to the Court establishes that current Kansas City, Missouri hourly rates for associates with experience and expertise comparable to Ms. Burkdoll and Ms. Goering range from $60.00 to $95.00 per hour. After careful consideration, the Court finds that $80.00 per hour rate is approximately $15 to $20 higher than the average hourly rate for Kansas City associates in 1982-84, the years in which Ms. Burkdoll and Ms. Goering compiled their hours. However,

the differential is necessary to compensate Mr. Benson for the delay in payment. However, the differential is necessary compensate Mr. Benson for the delay in payment. Accordingly, the Court will award Mr. Benson a total of $304,348.00 in fees for services rendered by Ms. Burkdoll and Ms. Goering from 1982 to 1984.

Benson also requested that he be awarded enhancements of $319,328 and $287,912 for the services of Ms. Burkdoll and Ms. Goering for the risk of nonpayment. As previously stated, the risk of nonpayment was very small and is fully reflected in the $80.00 per hour rate found to be reasonable by the Court.

The remaining two attorneys employed by Mr. Benson, Mr. Routman and Mr. Thomas, collectively compiled 89 hours from 1981 through 1983. At the time they began assisting Mr. Benson in this litigation, Mr. Routman had ten years of legal experience and Mr. Thomas five. Both are presently partners in Kansas City, Missouri law firms. After careful consideration, the Court finds that the hourly rate of $90.00 for Mr. Routman and $85.00 per hour for Mr. Thomas requested in the fee application are reasonable for the Kansas City, Missouri area. Therefore, the Court will award Mr. Benson $7,663.00 in attorney's fees for the services of Mr. Routman and Mr. Thomas.

Mr. Benson also requested an enhancement of the above award for the risk of nonpayment. Again, the Court finds that such a risk is very small and is fully reflected in the hourly rate calculated by the Court.

Mr. Benson also employed seven paralegals and four law clerks for whom he requests fees. The evidence presented to the Court indicates that the current Kansas City hourly rates is $40.00 an hour for paralegals and $35.00 for law clerks, the rates requested by Mr. Benson. Therefore, the Court finds that the requested rates are reasonable for the services rendered and will award Mr. Benson $225,084.50 for paralegal and law clerk fees.

Furthermore, the Court notes that it has adequately compensated Mr. Benson for the delay in payment by calculating this award based upon the current, rather than the historical, hourly rates.

In addition, Mr. Benson requests $73,182.43 in litigation expenses that he has personally incurred from 1979 to June 30, 1986. The Court has carefully reviewed these expenditures and finds them necessary and reasonable costs. Therefore, the Court will award the requested amount.

Mr. Benson also seeks $72,702.49 in fees and expenses incurred in preparing and litigating his fee application. Such fees and expenses are compensable under 42 U.S.C. § 1988. *Doulin v. White*, 549 F. Supp. 152, 159 (E.D. Ark. 1982). Mr. Benson was represented in his fee application by Mr. Russell Lovell, a professor of law at Drake University. Mr. Lovell is a regular lecturer on civil rights litigation, including attorney's fees. Prior to joining the law faculty at Drake University, Mr. Lovell practiced law for five years and served as counsel of record in approximately twenty federal court civil rights cases. Based upon the skill and experience of Mr. Lovell and type of work involved, the Court finds that $125.00 per hour is a reasonable Kansas City, Missouri hourly rate for preparing and litigating this fee application. The Court finds that the time records submitted by Mr. Lovell represent hours reasonably expended on the fee application. Therefore, the Court will award $47,387.50 for services rendered by Mr. Lovell.

Mr. Benson requests a fee of $10,125.00 for his services in litigation of his fee application. Having reviewed the time records submitted by Mr. Benson, the Court finds that the 81 hours listed represent time that was reasonably expended on the litigation. In addition, the Court finds that the $125.00 hourly rate requested by Mr. Benson is a reasonable rate for the work performed. Therefore, the Court will award Mr. Benson the amount requested.

In addition, Mr. Lovell and Mr. Benson collectively employed three paralegals and two law clerks to assist in the preparation of the fee application. The Court has reviewed the hours submitted by these individuals and finds them reasonable. Furthermore, the rates requested, $40.00 per hour for paralegals and $35.00 per hour for law clerks, are certainly reasonable rates for the Kansas City area. Therefore, the Court will award $7,865.00 in fees requested for these staff members.

Finally, Mr. Benson requests $7,324.49 for expenses incurred in litigation of this fee application. Having reviewed the record submitted, the Court finds that these expenditures were necessary and their cost reasonable and will award the amount requested.

In summation, the Court finds that Mr. Benson and his staff are entitled to a total award of $1,687,139.92 in fees and expenses for services rendered from 1979 to June 30, 1986, and for fees and expenses incurred in litigating his fee application. To date, Mr. Benson has received $347,332.93 of this amount, leaving a balance due of $1,339,806.99.

THE LEGAL DEFENSE FUND

The Court finds that this highly complex case required resources far beyond those available to Mr. Benson. Therefore, it was necessary for Mr. Benson to obtain the assistance of an organization such as the LDF. The LDF entered the case in March, 1982 as co-counsel for the plaintiffs and is now requesting an award of $3,170,600.20 in fees and expenses for services rendered through May, 1985.

Approximately $2.5 Million of the total amount requested by the LDF represents fees of attorneys, paralegals and law clerks. As stated previously, the first step in determining a reasonable fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Regarding the hours submitted by the

LDF, the Court finds that the LDF properly excluded the time that was clearly allocable to work done on the unsuccessful claims pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court finds that the remaining hours, except for 3.5 hours submitted by Mr. Liebman for a 12-21-83 flight from Kansas City to New Mexico, were reasonably expended on the litigation, and are deserving of compensation.

In determining a reasonable hourly rate for the services of the various LDF attorneys and support personnel, it is noteworthy that such fees are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. *Blum v. Stenson*, 465 U.S. at 895. The "relevant community" is the "general locality in which the litigation takes place." *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980). Therefore, the hourly rates to be awarded the attorneys and staff of the New York based LDF will be determined according to Kansas City, Missouri rates.

Seven of the LDF staff attorneys assisted Mr. Benson in the litigation of this case from March 1982 to May 1985. In determining a reasonable hourly rate for each attorney's services, the Court has considered the twelve factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19. The LDF attorneys are salaried and do not charge a customary fee. Therefore, the Court must judge the experience, reputation and ability of the individual attorneys and determine a reasonable hourly rate for a Kansas City, Missouri attorney with similar expertise and experience. Based upon the evidence presented the court finds that the current Kansas City, Missouri hourly rate for attorneys with litigation experience and expertise comparable to that of LDF attorneys Liebman, Johnston, and Lief range from $125 to $175 per hour. In addition the court finds that these attorneys are entitled to compensation for delay in payment. Therefore, the Court will award the LDF attorney's fees at the current, rather than historical, rates. Accordingly, the Court

finds that the $160.00 requested by Mr. Liebman is a reasonable hourly rate and will award the LDF $650,688.00 for his services rendered through May of 1985. Similarly, the Court finds that $175.00 per hour is a reasonable hourly rate for the services of Mr. Johnston and Ms. Lief and will award fees of $62,002.50 and $122,447.50 respectively for their services.

The Court finds that the experience and expertise of attorneys Shaw, Fins, Winter and Hair at the time of their involvement in this case is comparable to that of associates with five or fewer years experience. The current Kansas City hourly rate for such associates ranges from $60.00 to $95.00 per hour. Therefore, the Court finds that a reasonable hourly rate for the services of Mr. Shaw, Mr. Winter, Ms. Hair and Ms. Fins in $95.00 per hour and the Court will award the LDF a total of $384,617.00 for their services.

LDF had requested rates higher than those awarded by the Court claiming that the complexity and scope of litigation prompted a hiring freeze and precluded it from accepting other cases for which it would receive payment sooner. The Court considered this factor, but finds that during this litigation the LDF employed additional attorneys who were not involved in this litigation and were available for work on other cases.

The LDF also requested the Court to award it a contingency enhancement of $688,874.30. As stated previously, the Court finds that the plaintiffs' risk of loss, and thus the LDF's risk of nonpayment, was very slight and is fully reflected in the reasonable fees calculated by the Court.

In addition, the LDF requests an award for the services of numerous paralegals, law clerks and recent law graduates. Based upon the evidence presented, the Court finds that the requested rates of $50.00 an hour for recent law graduates, $40.00 for paralegals, and $35.00 an hour for law clerks are comparable to the current Kansas City, Missouri rates for these services.

Therefore, the Court will award the LDF $431,337.75 in fees for the services rendered from March, 1982 to May 1985.

In addition, the LDF requests $627,637.85 in litigation expenses. The Court has carefully reviewed these expenditures and finds that they were necessary and their cost reasonable. Accordingly, the Court will award the LDF the requested amount.

The LDF also requested an award of $65,411.64 in attorney's fees and expenses incurred in the preparation and litigation of their fee application. The Court has reviewed the time records submitted by the four attorneys who represented the LDF in their fee application and finds that they contain only those hours that were reasonably expended on the litigation. However, the Court finds that the New York rates requested by these attorneys, ranging from $160.00 to $330.00 per hour, are excessive and do not reflect a reasonable hourly rate in the Kansas City, Missouri area for similar work. As the Court found in considering Mr. Benson's request for attorney's fees incurred in litigating his fee application, $125.00 per hour is a reasonable hourly rate for such work in the Kansas City, Missouri area. Thus, the Court will award the LDF $29,050.00 in fees for services rendered in litigating its fee application.

The LDF also requests $11,441.33 for expenses incurred in litigating its fee application. Having carefully reviewed these expenditures, the Court finds that they were necessary and their cost reasonable and will award the amount requested.

KCMSD

KCMSD requests an award of $1,298,198.70 for attorney's fees and expenses for work performed from March 1977 through June, 1986. The issue before the Court is whether the Kansas City, Missouri school district is a "prevailing party" within the meaning of 42 U.S.C. § 1988.

A party may be considered a prevailing party for attorney's fees purposes of they "succeed on any significant issue in the litigation which achieves some of the benefit the party sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. at 433. For purpose of analysis of the attorney's fees issues, the "notion of 'prevailing party' is to be interpreted in a practical, nor formal, manner." *Northcross v. Board of Education*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

This Court did find in favor of the defendant KCMSD on its crossclaim against the State of Missouri defendants. *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). However, in its crossclaim, the KCMSD simply reiterated the allegations of the plaintiffs that the State of Missouri had failed to take action to dismantle its prior dual school system, and had acted to perpetuate the segregation. This Court found for the plaintiffs on this same claim against the state defendants. *Jenkins v. State of Missouri*, 593 F. Supp. at 1505. While the KCMSD has certainly been improved by the remedial plans ordered by the Court after assessing liability against the State and the KCMSD, it is the plaintiffs, the victims of unlawful segregation, who have benefited by prevailing on this claim originally alleged in their complaint and subsequently made by the KCMSD in its crossclaim against the State of Missouri. Moreover, the Court finds that the same remedial plans would have been ordered, and thus the KCMSD would have received the same benefits, even if it had not reiterated the plaintiffs' allegation in its crossclaim.

In addition, KCMSD in its crossclaim charges that the State should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. The KCMSD was adjudged liable for adopting ineffective policies to change the segregative patterns and was subsequently directed to fund approximately 20% of the initial remedy ordered by the Court. *Jenkins v. State of Missouri*, 639 F. Supp. 19 (W.D. Mo. 1986). However, on appeal, the Eighth Circuit held that the desegregation costs ordered by this Court should be divided

equally between the KCMSD and the State of MIssouri because both were adjudged constitutional violators. *Jenkins v. State of Missouri*, 807 F.2d 657, 684-85 (8th Cir. 1986).

Finally, the KCMSD alleges in its crossclaim, as did the plaintiffs in their complaint, that the State is liable for interdistrict violations. It is undisputed that the KCMSD and the plaintiffs failed in their attempt to prove an interdistrict liability against the State of Missouri.

Therefore, after a closs[sic] examination of the KCMSD's crossclaim against the State of Missouri defendants, the Court finds that the KCMSD, as a practical matter, is not a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Notwithstanding the foregoing analysis, there exists a separate and compelling reason why the KCMSD should not be awarded attorney's fees and expenses in this case. In *Jenkins v. State of Missouri,* 593 F. Supp. 1485 (W.D. Mo. 1984), this Court found that the KCMSD had violated the United States Constitution by adopting policies which perpetuated, rather than eliminated, segregation in its schools. Therefore, the Court finds it inappropriate to award attorney's fees to a constitutional violator.

Accordingly, the KCMSD's motion for an award of attorney's fees and expenses will be denied.

AFT 691

Intervenor Kansas City, Missouri Federation of Teachers Local 691 (AFT 691) requests an award of $62,169.37 for attorney's fees and expenses incurred through March 1, 1987. This determination lies within the sound discretion of this Court. *Little Rock School District v. Pulaski County Special School District*, 787 F.2d 372 (8th Cir. 1986).

As noted several times in this opinion, a party may be considered a prevailing party under 42 U.S.C. § 1988 if it succeeds on any significant issue in the litigation which achieved some of the benefits the party sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. at 433. AFT 691 was granted leave to intervene in this case on November 5, 1985, following the Court's liability order of September 17, 1984. AFT 691 had sought leave to intervene to protect the interests of its members and to assist the Court in fashioning a remedy to further litigation. Notwithstanding, AFT 691's participation in this litigation has been de minimis. As other courts have recognized, this Court finds that an intervenor should not be awarded attorney's fees unless it has played a significant role in the litigation. *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985).

Accordingly, AFT 691's application for attorney's fees and expenses will be denied.

LIABILITY FOR THE FEES AND EXPENSES AWARDED

For the reasons set forth in this opinion, the Court will award the plaintiffs approximately $4 Million in attorney's fees and expenses for work performed in this case. The remaining question before the Court is against whom will these fees be charged.

Plaintiffs succeeded on their liability claim against the State of Missouri defendants in this case. *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). This Court found the State of Missouri to be the primary constitutional violator because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative action to eliminate the vestiges and devastating effects of the dual school system it had created. *Jenkins v. State of Missouri*, 593 F. Supp. at 1505-06. Accordingly, the Court

finds that the State of Missouri defendants are liable for the attorney's fees and expenses to be awarded plaintiffs' counsel in this case.

This Court also found in favor of the plain tiffs in their claim against the KCMSD. *Jenkins v. State of Missouri*, 593 F. Supp. at 1505. However, the Court did not find that the KCMSD caused the unlawful segregation within its district, but rather that it failed to fulfill its constitutional obligation to act to disestablish the dual system created by the State of Missouri. *Jenkins v. State of Missouri*, 593 F. Supp. at 1504. This Court found that the KCMSD had adopted policies which were ineffective in eliminating the unlawful segregation. *Id.*

Despite the adjudged constitutional violations of the KCMSD, the Court finds that the KCMSD is not chargable[sic] for the attorney's fees and expenses to be awarded by the Court. The KCMSD, originally a plaintiff in this action, was involuntarily made a defendant by the Court in 1978. *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 445 (W.D. Mo. 1978). After 1978, the KCMSD and the plaintiffs cooperated closely in the development and prosecution of the litigation and the KCMSD actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs.

In addition, the Court notes that in May, 1980 the State of Missouri defendants were adjudged "primary constitutional violators" in the St. Louis school desegregation case on facts very similar to those in the present case. *Liddell v. Board of Education of the City of St. Louis, Missouri*, 491 F. Supp. 351, 359 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir. 1981). Despite this finding, the State of Missouri defendants persisted in denying liability during the 10 1/2 month trial in this case on the liability issues.

For the reasons stated, the Court will order that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses to be awarded the plaintiffs in this case.

Accordingly, it is hereby

ORDERED that the Court awards Mr. Benson $1,614,437.43 in fees and expenses for services rendered by him and his staff from 1979 through June 30, 1986; and it is further

ORDERED that the Court awards Mr. Benson $72,702.49 in fees and expenses incurred in litigating his fee application; and it is further

ORDERED that because Mr. Benson has previously received $347,332.93 of this award, the balance due Mr. Benson is $1,339,806.99; and it is further

ORDERED that the Court awards the LDF $2,323,730.60 in fees and expenses for services rendered through May of 1985; and it is further

ORDERED that the Court awards the LDF $42,145.14 for fees and expenses incurred in litigating its fee application; and it is further

ORDERED that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses awarded by the Court, including the $347,332.93 the State has previously paid Mr. Benson; and it is further

ORDERED that the KCMSD's motion for an award of attorney's fees and expenses is denied; and it is further

ORDERED that AFT 691's motion for an award of attorney's fees and expenses is denied.

/s/RUSSELL G. CLARK,
DISTRICT JUDGE,
UNITED STATES
DISTRICT COURT

Dated: May 11, 1987

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

FILED: FEB. 26, 1990

ORDER

Before the Court is plaintiffs' motion for award of post-judgment interest. The State filed a response and plaintiffs filed a reply to the State's response. The State filed a memorandum reply to plaintiffs' reply and plaintiffs filed a comment to the State's memorandum reply. Plaintiffs' motion for award of post-judgment interest will be granted.

On September 17, 1984, the Court entered judgment in the above-captioned case in favor of plaintiffs and against the State and the KCMSD. *Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). On February 24, 1986, the Court entered an order stating that "[c]learly under the law, counsel for plaintiffs are entitled to an award of attorney's fees" and ordered t he State to make an immediate partial payment of attorneys' fees to Arthur Benson in the amount of $200,000. *Id.*, Order of February 24, 1986, at 1-2. Subsequently, on May 11, 1987, the Court entered an order stating that plaintiffs were entitled to recover attorneys' fees in the above-captioned case and directing the State to pay Benson $1,687,139.92 in attorneys' fees and ex-

penses and to pay the Legal Defense Fund $2,365,875.74 in attorneys' fees and expenses.

Plaintiffs' motion for award of post-judgment interest argues that plaintiffs are entitled to post-judgment interest on attorneys' fees from the date of the February 24, 1986, order in which the Court first determined plaintiffs were entitled to an award of attorneys' fees. The State responds that post-judgment interest is only available from the date of the May 11, 1987, order quantifying plaintiffs' attorneys' fees and that even if post-judgment interest runs from a date earlier than the quantifying of the fee award, the Court's award of current market rates and enhancement of Benson's rate for delay in payment should preclude awarding post-judgment interest prior to the quantifying of the fee award, as it would result in a windfall to plaintiffs.

Plaintiffs originally alleged claims against defendants under 42 U.S.C. §§ 1983 and 2000d and under the 14th Amendment to the United States Constitution. *Id.*, 593 F. Supp. at 1488. Plaintiffs were successful on their claims, *see id.* at 1506, and were subsequently awarded attorneys' fees as a "prevailing party" pursuant to 42 U.S.C. § 1988. *Id.*, Order of May 11, 1987, at 2. 28 U.S.C. § 1961(a) (emphasis added) provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. *Such interest shall be calculated from the date of the entry of the judgment*, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States

> Courts shall distribute notice of that rate and any changes in it to all Federal judges.

It is well-settled that the language "any money judgment" in § 1961 includes a judgment awarding attorneys' fees, *see, e.g., Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988); *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 543 (5th Cir. 1983) (en banc) (per curiam); *Spain v. Mountanos*, 690 F.2d 742, 748 (9th Cir. 1982), and therefore plaintiffs are entitled to an award of interest on their attorneys' fees judgment pursuant to § 1961. The dispute resulting in the current motion arises from the following § 1961 language: "Such interest shall be calculated from the date of the entry of the judgment. . . ." Plaintiffs contend that interest on plaintiffs' attorneys' fees award should begin to accrue on February 24, 1986, which is the date the Court first entered an order stating that plaintiffs were entitled to recover attorneys' fees. The State argues that interest on the attorneys' fees award should not begin to accrue until May 11, 1987, which is the date the Court entered an order quantifying plaintiffs' attorneys' fees award.

All courts that have specifically addressed this issue have determined that interest should accrue from the date the Court recognizes the party's right to recover attorneys' fees even if the fees were not quantified. The Fifth Circuit has stated:

> If a judgment is rendered that does not mention the right to attorneys' fees, and the prevailing party is unconditionally entitled to such fees by statutory right, interest will accrue from the date of judgment. If, however, judgment is rendered without mention of attorneys' fees, and the allowance of fees is within the discretion of the court, interest will accrue only from *the date the court recognizes the right to such fees in a judgment.*

Copper Liquor, 701 F.2d at 545 (emphasis added). In a footnote that court stated that the "rule should not extend to the allowance of interest prior to the time of *the judgment recognizing the right to costs and fees*." *Id.* at 544 n.3 (emphasis added). The Federal Circuit agreed with the Fifth Circuit:

> The provision for calculating interest from entry of judgment deters use of the appellate process by the judgment debtor solely as a means of prolonging its free use of money owed the judgment creditor. *Interest on an attorney fee award thus runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.*

Mathis, 857 F.2d at 760 (citation omitted) (emphasis added). The district courts which have specifically addressed the issue reach the same result as *Copper Liquor* and *Mathis*. *See Water Technologies Corp. v. Calco Ltd.*, 714 F. Supp. 899, 910 (N.D. Ill. 1989); *Proctor & Gamble Co. v. Weyerhaeuser Co.*, 711 F. Supp. 904, 908 (N.D. Ill. 1989); *Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 522-23 (S.D.N.Y. 1984); *Burston v. Commonwealth of Virginia*, 595 F. Supp. 644, 652 (E.D. Va. 1984). The court in *Williamsburg* justified its award of interest on attorneys' fees from the date the fees were awarded as follows:

> If a dollar amount had been set by this Court when the order was entered [granting plaintiffs' request for attorneys' fees], the plaintiffs' attorneys would have been entitled to immediate payment. Since the amount of the award was not set forth at that time, the defendants have enjoyed the use of that money and the plaintiffs' attorneys have not.

Williamsburg, 599 F. Supp. at 523.

It appears that the cases cited by the State to support the proposition that interest begins to accrue on the date an attor-

neys' fees award is quantified are distinguishable from the current case and do not specifically address the issue raised in the current motion. In *R.W.T. v. Dalton*, 712 F.2d 1225, 1228 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), the district court granted summary judgment in favor of plaintiffs on October 14, 1980, and on March 30, 1982, entered a final judgment awarding plaintiffs' attorneys' fees in the amount of $34,815, but with no award of post-judgment interest. The Eighth Circuit determined that the district court should have awarded interest on plaintiffs' attorneys' fees award from March 30, 1982, until payment. *Id.* at 1234-35. The State argues that *Dalton* indicates that the Eighth Circuit intended for post-judgment interest on an attorneys' fees award to begin to accrue only from the date of an order quantifying such award. Although *Dalton* is somewhat ambiguous on this issue, the Court does not agree with the State's interpretation of *Dalton*. From the Eighth Circuit's opinion it would appear that the district court determined that plaintiffs were entitled to an award of attorneys' fees *and* quantified the award of fees both in the March 30, 1982, order. Therefore, there was no need for the Eighth Circuit to specifically address and determine if post-judgment interest began to accrue on the date the court determined plaintiffs were entitle[sic] to an award of attorneys' fees or the date the attorneys' fees award was quantified. In addition, the Court notes that in *Dalton* the Eighth Circuit approvingly cited *Copper Liquor* as authority. *Id.* at 1234.

The State also cites *Griffin v. Ozark County, Missouri*, 688 F. Supp. 1372 (W.D. Mo. 1988). In *Griffin*, the court entered an order on December 8, 1987, in favor of plaintiff in the amount of $500 plus attorneys' fees. *Id.* at 1372. On June 1, 1988, the court entered an order quantifying the attorneys' fees award. *Id.* at 1377. The court cited *Dalton* in awarding plaintiff interest on attorneys' fees from the date of the order quantifying the attorneys' fees award. However, based upon the discussion of *Dalton* previously in this order, it appears that the *Griffin* court's

reliance on *Dalton* is misplaced. In addition, the Court notes that the *Griffin* court did not specifically address the issue raised by the current motion.

The remaining cases cited by the State or disclosed through the Court's research are not dispositive on the issue of when post-judgment interest begins to accrue on an attorneys' fees award because the cases do not specifically address that issue and the courts in those cases both awarded attorneys' fees *and* quantified such awards on the same date. *See Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985); *McCullough v. Cady*, 640 F. Supp. 1012, 1028 (E.D. Mich. 1986); *Advo System, Inc. v. Walters*, 110 F.R.D. 426, 433 (E.D. Mich. 1986); *Spell v. McDaniel*, 616 F. Supp. 1069, 1115 (E.D.N.C. 1985), *vacated in part on other grounds*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). In fact, the court in *Spell* cited *Dalton* when stating that "interest accrues as a matter of course from the date of entry of the judgment *awarding* fees," as opposed to quantifying fees. *Id.* (emphasis added). The court in *Advo* also stated that interest accrues "from the date of the judgment *allowing* this award." *Advo*, 110 F.R.D. at 433 (emphasis added). Although the court in *McCullough* made the correct statement that "[c]laims for attorneys' fees and costs are unliquidated until finally determined by the court and a judgment entered," the court continued by stating that "interest will be applied to the total amount of [the attorneys' fees award] from the date of the judgment *allowing* this award." *Id.* (emphasis added).

Therefore, the Court finds that the weight of authority favors an award of interest on plaintiffs' attorneys' fees award from February 24, 1986, the date the Court first determined that plaintiffs were entitled to an award of attorneys' fees. The State argues that even if post-judgment interest is available to plaintiffs from February 24, 1986, such an award would not be appropriate in this case because plaintiffs received both current

market rates and an enhancement for delay in payment in the May 11, 1987, order quantifying plaintiffs' attorneys' fees award. Thus, the State argues that allowing plaintiffs to receive post-judgment interest form February 24, 1986, results in a windfall to plaintiffs. However, allowing plaintiffs to receive post-judgment interest from February 24, 1986, does not result in a windfall to plaintiffs. In its order of May 11, 1987, the Court determined that Benson's hourly rate would fall at the high end of a $125 to $175 per hour range. *Jenkins*, Order of May 11, 1987, at 4. The Court then considered the preclusion of other employment by Benson due to this case, the undesirability of the case and the delay in payment and found that "a reasonable hourly rate for Mr. Benson's services from 1979 through June 30, 1986, is $200.00 per hour." *Id.* at 4-5. Thus, it is clear that the enhanced hourly rate for Benson was not based solely on delay in payment, but also included the undesirability of the case and preclusion of other employment. In addition, although the Court stated that the enhanced hourly rate was for Benson's services through June 30, 1986, Benson's last time entry for litigation other than Year I monitoring and attorneys' fees litigation, which were compensation at a lower hourly rate of $125, *id.* at 8; *id.*, Order of July 14, 1987, at 2, was on September 3, 1985. Benson was the only attorney whose hourly rate was enhanced and this enhancement was for services rendered prior to September 3, 1985. Benson was the only attorney whose hourly rate was enhanced and this enhancement was for services rendered prior to September 3, 1985. This fact, combined with the Court's statement that "a reasonably hourly rate for Mr. Benson's services from 1979 through June 30, 1986, is $200.00 per hour," *id.*, Order of May 11, 1987, at 4-5, indicates that the May 11, 1987, order did not compensate Benson at current 1987 market rates, but instead at 1986 rates. The attorneys' fees award at the 1986 rates and its enhancement was not meant to be a substitute for post-judgment interest. Therefore, the Court finds that an award of post-judgment interest on plaintiffs' attorneys fees award is appropriate.

In the alternative, plaintiffs' motion requests the Court to award Benson $178,859.18 in prejudgment interest. Because the Court will grant plaintiffs' motion, it is unnecessary for the Court to address the issues contained in plaintiffs' alternative motion.

For the foregoing reasons the Court will grant plaintiffs' motion for award of post-judgment interest. The United States Treasury Bill rate on February 24, 1986, was 7.71% and, therefore, plaintiffs are entitled to an award of interest on their attorneys' fees award at a rate of 7.71% from February 24, 1986. The State shall be solely liable for such interest payments. *See id.* at 14-16. The State's post-judgment interest obligation to Arthur Benson and the Legal Defense Fund shall be credited $113,379.44 and $184,124.26, respectively, for June 23, 1989, payments of post-judgment interest by the State.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for award of post-judgment interest is granted; and it is further

ORDERED that plaintiffs are awarded post-judgment interest at a rate of 7.71% from February 24, 1986, on their attorneys' fees award; and it is further

ORDERED that the State shall be solely liable for post-judgment interest payments to plaintiffs; and it is further

ORDERED that the State's post-judgment interest obligation to Arthur Benson and the Legal Defense Fund shall be credited $113,379.44 and $184,124.26, respectively, for previous post-judgment interest payments.

RUSSELL G. CLARK, JUDGE
UNITED STATES
DISTRICT COURT

Date: February 26, 1990

Supreme Court, U.S.
FILED
SEP 27 1991
OFFICE OF THE CLERK

No. 91-360

In The

Supreme Court of the United States

October Term, 1991

STATE OF MISSOURI, et al.,

Petitioners,

vs.

KALIMA JENKINS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS KALIMA JENKINS, et al. IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether post-judgment interest under 28 U.S.C. § 1961 on an attorneys' fees award should accrue from the date of the judgment establishing plaintiffs' entitlement to a statutory fees award and ordering an immediate $200,000 partial payment or from a subsequent judgment that quantifies the fees award in its entirety?

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STATEMENT OF THE CASE

The statement of the case in the petition does not adequately describe either the district court's attorneys' fees judgments or the decision and reasoning of the United States Court of Appeals.

The district court entered two judgments on the underlying attorneys' fees litigation.[1] On February 24, 1986, a judgment was entered which established respondents' entitlement to attorneys' fees, per 42 U.S.C. § 1988, and ordered petitioners to make immediate payment of $200,000 to respondents' lead counsel, Arthur Benson. App. C., Pet. App. A-14. No appeal was taken from this judgment and the ordered interim fees were paid. Respondents' fees award was quantified in its entirety in a judgment entered on May 11, 1987, as modified on July 14, 1987. App. D, Pet. App. A-16. The total Benson fees judgment was $1,729,230; the total NAACP Legal Defense Fund (LDF) fees judgment was $2,365,875. This latter judgment was affirmed in all respects by the Eighth Circuit, *Jenkins v. Missouri*, 838 F.2d 260 (8th Cir. 1988), and by this Court, *Missouri v. Jenkins*, 491 U.S. 274 (1989).

The parties agreed that respondents were entitled to post-judgment interest on their attorneys' fees award under 28 U.S.C. § 1961. The parties disagreed as to

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[1] The final judgment on the merits was entered on June 14, 1985. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).

whether interest should accrue from the February 24, 1986 fees judgment or from the May 11, 1987 fees judgment. On February 26, 1990, the district court granted respondents' motion for post-judgment interest on their fees award, with interest accruing from the February 24, 1986 judgment. *Jenkins v. Missouri*, 731 F. Supp. 1437 (W.D. Mo. 1990); App. E, Pet. App. A-33.

The Eighth Circuit affirmed the district court's judgment awarding post-judgment interest, with Chief Judge Lay writing a separate concurrence. *Jenkins v. Missouri*, 931 F.2d 1273 (8th Cir. 1991); App. B, Pet. App. A-3. In construing §1961, the court of appeals followed the lead of the Federal Circuit in *Mathis v. Spears*, 857 F.2d 749 (Fed. Cir. 1988), and adopted the two-part test fashioned by the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983)(en banc)(per curiam), to determine when interest commences to accrue on attorneys' fees awards:

> "If a judgment is rendered that does not mention the right to attorneys' fees, and the prevailing party is unconditionally entitled to such fees by statutory right, interest will accrue from the date of the judgment. If, however, judgment is rendered without mention of attorneys' fees, and the allowance of fees is within the discretion of the court, interest will accrue only from the date the court recognizes the right to such fees in a judgment."

Jenkins v. Missouri, 931 F.2d at 1275-76; App. B, Pet. App. A-7-A-8. The court concluded that the *Copper Liquor* standard stated the correct construction of §1961 and

furthered important public policies. It recognized that awarding interest from the entry of a judgment establishing entitlement to fees compensates prevailing parties for loss of the use of their fees during the balance of the fees litigation and removes any artificial incentive which fees opponents might otherwise have to protract the fees litigation.

> ("The provision for calculating interest from entry of judgment deters use of the appellate process by the judgment debtor solely as a means of prolonging its free use of money owed the judgment creditor"). The award of interest also serves the make-whole obective of the fee awards in civil rights cases. * * * We also observe that if the accrual of post-judgment interest is delayed until fee awards are quantified and attorneys are thus not fully compensated for their successful efforts, they may be reluctant to take on complex and expensive litigation.
>
> The State argues that until the fee award is liquidated, the party responsible for payment has no way to satisfy its obligation, and thus, no interest should accrue. We are not persuaded by this argument. The fee-paying party suffers no prejudice from any delay in quantifying the award because it has the use of the money in the interim and because the statutory interest rate is tied to the U.S. Treasury Bill rate.

Jenkins, 931 F.2d at 1275; App. B, Pet. App. A-9-A-10. The Court concluded that under the second part of the *Copper Liquor* standard,[2] the district court correctly awarded

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[2] In the exercise of billing judgment, respondents did not request post-judgment interest from the date of their June 1985

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respondents post-judgment interest from the February 24, 1986 judgment establishing respondents' entitlement to fees. *Jenkins*, 931 F.2d at 1275; App. B, Pet. App. A-11. Judge John Gibson, who authored both the *en banc* decision on the merits, 807 F.2d 657 (8th Cir. 1986), and the earlier panel decision on attorneys' fees, 838 F.2d 260 (8th Cir. 1988), wrote the Eighth Circuit decision on post-judgment interest from which petitioners seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

It is noteworthy that petitioners make no attempt to explain why this case has national importance worthy of the attention of the United States Supreme Court. In addition, petitioners do not address the reality that the decision below turns on its own facts, and, as a precedent, will affect relatively few other litigants. As a result of the protracted nature of the instant complex class action, the district court entered two fees judgments – one

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merits judgment; however, they have consistently contended that that judgment, which established their entitlement to fees under §1988, satisfied the first prong of the *Copper Liquor* standard for post-judgment interest and provided an alternative basis for affirmance of the district court's judgment. Both the district court and the Eighth Circuit declined to decide whether under the first prong of the *Copper Liquor* standard respondents were entitled to post-judgment interest from their June 14, 1985 merits judgment. *Jenkins*, App. B, Pet. App. A-8 n.2.

which established entitlement to fees and ordered a substantial interim payment, and one which quantified the total fees award and ordered payment thereof. The more typical case awarding attorneys' fees under §1988 does not present an issue as to which fees judgment triggers the accrual of post-judgment interest because there is only one fees judgment, and it both establishes entitlement to and quantifies the fees.

Petitioners contend that certiorari should be granted to resolve a conflict between the Eighth Circuit's decision in the instant case and decisions of the Seventh Circuit in *Fleming v. County of Kane*, 898 F.2d 553 (7th Cir. 1990), and the Ninth Circuit in *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973). Petitioners are mistaken. There is no conflict among the circuits as to the date post-judgment interest begins to accrue on statutory awards of attorneys' fees. Notably, neither *Fleming* nor *Perkins* was found by the Eighth Circuit to be in conflict with its decision in the instant case. The Eighth Circuit concluded *Fleming* was inapposite – a decision on pre-judgment interest rather than post-judgment interest. *Jenkins v. Missouri*, App. B, Pet. App. A-7; *see* Part II.B. *infra*. Although post-judgment interest per §1961 was at issue in *Perkins*, the Eighth Circuit found that *Perkins* did not "address the issue before us." *Id.* at A-8 n.3.; *see* Part II.C. *infra*.

Petitioners also contend that this "Court's review of the *Jenkins* case is necessary to reconcile the Eighth Circuit's interpretation of . . . §1961(a) with the principles established in this Court's decision in" *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990). Cert. Pet. at 6. Petitioners contend that the distinction made in *Bonjorno* between the date of verdict and the date of

judgment, with post-judgment interest held to run from the date of judgment, is comparable to the distinction "between the date that the right to some attorney's fees is recognized and the date the fee award is quantified." *Id.* at 8. The Eighth Circuit found "*Bonjorno* [did] not address the issue before us." *Jenkins*, App. B., Pet. App. A-8 n.3. Petitioners fail to perceive that *Bonjorno* merely confirmed that it is a *judgment* which triggers the accrual of interest per §1961. Consistent with *Bonjorno*, post-judgment interest was awarded from the judgment which established respondents' entitlement to attorneys' fees and ordered immediate payment of $200,000. *See* Part III *infra*.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

A. The Fifth And Federal Circuit Decisions In *Copper Liquor* And *Mathis*

As discussed preliminarily in the Statement of the Case, the Eighth Circuit in the instant case followed the lead of the Federal Circuit in *Mathis v. Spears*, 857 F.2d 749 (Fed. Cir. 1988), and expressly adopted the test developed by the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc). Thus, three circuits now hold that post-judgment interest on attorneys' fees awards accrues either from the date of entry of the judgment on the merits when "the prevailing party is unconditionally entitled to such fees by statutory right," or "from the date the court recognizes the right to such fees in a judgment" when fees are "within the discretion of the court." *Copper Liquor*, 701 F.2d at 545; *Mathis v. Spears*, 857 F.2d at 760.

In *Copper Liquor* post-judgment interest on the fees award was based on the first prong of the alternative standard. Even though the actual amount of fees was not finally resolved until three years later, post-judgment interest was awarded from the district court's merits/fees judgment for legal services performed prior to that judgment, because that judgment first established plaintiffs' entitlement to fees.[3]

In *Mathis v. Spears*, the district court concluded that a patent infringement suit was frivolous and conducted in bad faith, which qualified defendants for an award of attorneys' fees under the "exceptional" case standard of 35 U.S.C. §285. The district court awarded §1961 post-judgment interest on its fees award measured from the date of the judgment on the merits, rather than the date of its subsequent judgment quantifying fees. The

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[3] Like *Bonjorno*, *Copper Liquor* was a suit for damages under the Sherman Act. The jury found Coors liable, but the Fifth Circuit remanded the case for reconsideration of both damages and attorneys' fees. 506 F.2d 934 (5th Cir. 1975). The case was retried and the district court entered a judgment for damages and fees on July 31, 1978. The Fifth Circuit upheld the damages judgment but remanded for reconsideration of fees. 624 F.2d 575 (5th Cir. 1980). The district court entered an amended judgment on fees on June 29, 1981. The Fifth Circuit held that post-judgment interest on the fees award would run from the July 31, 1978 judgment for work performed before that date, because the 1978 judgment on the merits established plaintiffs' entitlement to fees, even though the fees were not finally quantified until 1981. Correctly anticipating *Bonjorno*, *see* Part III, *infra*, the Fifth Circuit did not award post-judgment interest on either damages or fees from the original judgment because it, by virtue of the retrial, was not a legally sufficient judgment.

Federal Circuit upheld the award[4]: "Interest on an attorney fee award thus runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum." 857 F.2d at 760.

B. The Seventh Circuit Decision in *Fleming*

The Seventh Circuit decision in *Fleming v. County of Kane*, 898 F.2d 553 (7th Cir. 1990), is badly confused.[5] The district court in *Fleming* never discussed the question of post-judgment interest. It never cited 28 U.S.C. §1961. In order to appreciate that *Fleming* presents no §1961 post-judgment interest issue whatsoever, it is necessary to work one's way through the details of the district court's studied effort to award a delay in payment enhancement

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[4] The district court's opinion holding for defendants on the merits also stated the plaintiff's " 'course of conduct demonstrates a recklessness with regard to the truth, which justifies an award of attorneys' fees under the "exceptional case" provision of 35 U.S.C. §285.' 1 USPQ2d at 1523." *Mathis*, 857 F.2d at 751. Although the court of appeals did not explain its application of the *Copper Liquor* alternative standard, this finding of the district court unquestionably established the defendants' entitlement to fees in the judgment on the merits, which, under the second prong of the alternative standard, caused interest to begin to accrue. Without this finding interest would not have commenced with the judgment on the merits, because fees awards to prevailing defendants are not routine, much less unconditional, in patent cases. *Id.* at 754. *See also Revlon, Inc. v. Carson Products Co.*, 803 F.2d 676 (Fed.Cir.), *cert. denied*, 107 S. Ct. 671 (1986); 1 M.Derfner & A.Wolf, *Court Awarded Attorney Fees*, §10.05 [3][b] at 10-60.13 (1988).

[5] The panel was comprised of circuit judges Flaum, Ripple, and Kanne. Judge Kanne authored the opinion.

and the contradictory reasoning of the court of appeals upholding the principle of enhancement but reversing the methodology of its calculation.

The district court did not adjust for the delay in payment by awarding current market rates, as is commonly done. *Fleming v. County of Kane*, 686 F. Supp. 1264, 1272-73 (N.D. Ill. 1988). Instead, the district court made a determination of historic billing rates and then adjusted for delay in payment. The delay in payment adjustment took "the form of adding interest at the prime rate from a date 30 days after the end of the month in which the services were rendered . . . to October 22, 1987." *Id.* at 1274. As the Seventh Circuit observed, October 22, 1987 was "the date on which judgment was entered on the jury's initial verdict as to liability." *Fleming*, 898 F.2d at 565. On June 23, 1988 the district court entered a minute order allowing fees of $205,176.80, final judgment on the fees award was entered on June 24, 1988.

On appeal the Seventh Circuit first held that it was not an abuse of discretion for the district court "to attempt to compensate plaintiff's attorneys for the delay [in payment] by applying an interest rate to the lodestar amount." *Id.* at 564 (footnote omitted).[6] Although the Court held that it could not conclude that use of the prime rate in calculating the delay in payment adjustment was an abuse of discretion, it, nonetheless, remanded to the district court to explain why it selected the prime rate

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[6] Although not cited, the Seventh Circuit's decision was consistent with this Court's ruling in an earlier stage of the fees litigation in the instant case, *Missouri v. Jenkins*, 491 U.S. 274 (1989), which upheld the appropriateness of delay in payment enhancements in §1988 fees awards.

rather than the lower rates for U.S. Treasury Bills or one-year certificates of deposit.[7] *Id.* at 565. Then, in a cursory two paragraphs,[8] the Seventh Circuit proceeded to

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[7] Such a remand would have been unnecessary had the interest calculation been of post-judgment interest under 28 U.S.C. §1961. The district court has no discretion with regard to the post-judgment interest rate. Section 1961 mandates use of the U.S. Treasury Bill rate.

[8] The Seventh Circuit stated:

> In the Memorandum Opinion and Order of April 12th, the district judge directed that interest should be added to the lodestar figure 'from a date 30 days after the end of the month in which the services were rendered' through October 22, 1987, the date on which judgment was entered on the jury's initial verdict as to liability. This application of interest is inappropriate.
>
> As we have noted, 'plaintiffs may collect interest on attorney's fees or costs only from the date that the award was entered.' *Ohio-Sealy [Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985)], at 662. Prior to the date the judgment on attorney's fees was entered, plaintiff's attorneys' claim for unpaid attorney's fees was unliquidated and, as such, not entitled to interest. *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672, 675 (9th Cir. 1973); *see also In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601, 609 (7th Cir. 1986), cert. denied, 484 U.S. 821, 108 S.Ct. 82, 98 L.Ed.2d 44 (1987) (under 28 U.S.C. §1961(a), the statutory presumption is that interest on money judgments 'shall be calculated from the date of the entry of the judgment'). In this case, the record clearly indicates that the award of attorney's fees was entered on June 24, 1988. Accordingly, interest will be allowed on the amount awarded as attorney's fees only from June 24, 1988 until the date the judgment is paid.

Fleming, 898 F.2d at 565.

instruct the district court that it had erred as to the date at which interest began to accrue in calculating the delay in payment adjustment. *Id.* Citing §1961 caselaw holding that post-judgment interest runs only from entry of a judgment, the Court instructed that the calculation of interest in the delay in payment enhancement would be allowed only from the June 24, 1988 fees judgment.

The Seventh Circuit's discussion on the accrual date of interest was solely in the context of advising the district court how to calculate the delay in payment adjustment on remand. Post-judgment interest on the fees award per §1961 was not even considered by the district court and was not at issue in the *Fleming* appeal. The issue in *Fleming* was the proper calculation of the delay in payment enhancement, which, in distinguishing *Fleming*, the Eighth Circuit characterized as a "pre-judgment interest" issue.[9] *Jenkins*, App. B, Pet. App. A-7. The Eighth Circuit, in deciding the instant case, declined to follow the *Fleming* reasoning, observing that "it is not clear whether the parties [in *Fleming*] presented this [post-judgment interest] issue." *Id.*

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[9] Although commenting that "[t]he *Fleming* result runs counter to the holdings of the Fifth Circuit in *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983)(per curiam), and the Federal Circuit in *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988)," *Jenkins v. Missouri*, App. B, Pet. App. A-7, the Eighth Circuit stated: "The *Fleming* court did not explain why it selected the date of fee quantification rather than the date of fee entitlement, and it is not clear whether the parties presented this issue. *Fleming* reversed the district court's ruling that had awarded pre-judgment interest on the attorney's fees." *Id.* at A-7.

Even under petitioners' mistaken view of *Fleming* (as a decision on post-judgment interest under §1961), *Fleming* is not inconsistent with the Eighth Circuit decision in the instant case. *See Id.* at A-13 n.2 (Lay, C.J., concurring). Although the district court in *Fleming* made an initial ruling that plaintiffs were entitled to attorneys' fees prior to final quantification of the fees, the initial ruling was not entered as a judgment.[10] In *Fleming*, as is typically the case, there was only one judgment on fees. The June 24, 1988 *judgment* which established the *Fleming* plaintiffs' entitlement to fees was also the judgment which quantified the fees. Had the Seventh Circuit been deciding post-judgment interest in *Fleming*, its comment that interest should accrue from the June 24, 1988 judgment would be consistent with *Copper Liquor* and the Eighth Circuit's decision in the instant case because the *Fleming* plaintiffs' entitlement to fees was not established *in a judgment* prior to that date. In the instant case, unlike *Fleming*, the district court's order establishing respondents' entitlement to fees and mandating a partial payment of $200,000 was

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[10] Under the *Copper Liquor* standard, post-judgment interest per §1961 conceivably could have commenced in *Fleming* had the district court's order of April 12, 1988 recognizing plaintiff's entitlement to fees been entered as a judgment requiring payment of a portion of the fees. A judgment, however, was not entered at that time and the court did not address the issue. Chief Judge Lay, in his concurrence in the instant case, concluded that post-judgment interest could not have begun to accrue in *Fleming* prior to the June 24, 1988 fees judgment because "the only reasonable conclusion is that the earlier opinions of the district court were not final judgments under Rule 58." *Jenkins*, App. B, Pet. App. A-13 n.2.

a final judgment and the accrual of post-judgment interest properly commenced upon its entry.

C. The Ninth Circuit Decision in *Perkins*

Contrary to the contention of petitioners, and as recognized by the Eighth Circuit in the instant case, *Perkins* did not address the issue raised by this petition. *Jenkins*, App. B, Pet. App. A-8 n.3. Indeed, close examination of the Ninth Circuit decision in *Perkins* demonstrates that it is consistent with the *Copper Liquor* standard and the decision in the instant case.

In *Perkins v. Standard Oil Co.*, 487 F.2d 672, 673-75 (9th Cir. 1973), the plaintiffs had prevailed in the United States Supreme Court, but its mandate made no reference to attorneys' fees. On remand the district court concluded fees were foreclosed and denied fees. The Supreme Court reversed, holding that the omission of fees from its mandate "left open" the matter of fees for the district court. *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970). Thereafter the district court awarded fees, which were subsequently reduced on appeal. *Perkins*, 487 F.2d at 674. The Ninth Circuit held that post-judgment interest on the reduced award ran from the date of the district court's fees award, rather than the date of the Supreme Court's earlier judgment on the merits or the date the fees were correctly quantified on appeal. *Id.* at 675-76.

It is clear from the Supreme Court's second ruling in *Perkins* that the award of attorneys' fees was not mandated upon the judgment on the merits (the Supreme

Court's first ruling), but was discretionary with the district court. The plaintiffs' entitlement to fees was, therefore, not established until entry of the district court's subsequent fees judgment. Thus, because the plaintiffs' entitlement to fees was established in the same judgment which quantified the fees, the court in *Perkins* would have had no occasion to consider the issue presented in the instant case.

III. THIS COURT'S DECISION IN *BONJORNO* IS INAPPOSITE

Bonjorno held that post-judgment interest properly ran from the date of entry of the damages judgment, rather than the date of verdict.[11] 110 S. Ct. at 1576.

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[11] The original jury verdict in *Bonjorno*, a suit for damages under the Sherman Act, was on August 21, 1979; judgment was entered for plaintiff Bonjorno on August 22, 1979 for $5,445,000 in damages. Defendant Kaiser filed a motion for new trial. Nearly two years later, the district court concluded there was insufficient evidence to support the damages awarded and granted defendant Kaiser's motion for a new trial on damages only. On December 2, 1981 a limited retrial on damages resulted in a jury verdict of $9,567,000; judgment was entered on that amount on December 4. Thirteen months later, on January 17, 1983, defendant Kaiser's motion for judgment notwithstanding the verdict as to a portion of the damages award was granted and the judgment was reduced by the district court to $4,651,560. Nearly two years later, on December 27, 1984, the Third Circuit reversed and vacated the January 17, 1983 judgment and reinstated and affirmed the December 4, 1981 judgment of $9,567,000.

Thereafter, the district court held that post-judgment interest per 28 U.S.C. §1961 ran from December 2, 1981, the date of

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Bonjorno also held that interest should not run from the 1979 judgment, the damages portion of which the district court found was not supported by the evidence and which was the subject of a new trial. *Id.*

As the Eighth Circuit recognized, *Bonjorno* has no application to the instant case. *Jenkins*, App. B, Pet. App. A-8 n.3. *Bonjorno*'s construction of §1961 to allow interest from the date of the judgment rather than the date of the jury verdict is, of course, inapposite to constitutional litigation conducted without a jury and involving only equitable relief. *Bonjorno's* holding that interest should be calculated from the December 4, 1981 judgment, rather than the original 1979 judgment subsequently vacated by the district court, is inapposite because the underlying judgment in the instant case, the February 24, 1986 fees judgment establishing entitlement to fees and ordering immediate partial payment, was unaltered by subsequent judicial proceedings or appeals.

The decisive consideration in *Bonjorno* was the plain language of §1961, which mandated that "interest [be] calculated from the date of entry of the judgment." In light of this statutory text, and in the absence of legislative history to the contrary, this Court held that interest

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the damages verdict on which the correct judgment would have been entered but for the district court's erroneous partial grant of judgment notwithstanding the verdict. The Third Circuit affirmed the district court's determination that interest should be calculated from December 2, 1981, but reversed the district court's interest determination to the extent it did not utilize the amended version of §1961 effective October 1, 1982.

would accrue only upon entry of the damages judgment even though policy considerations might favor the award of interest from the earlier date of verdict. The statutory text was dispositive. *Bonjorno*, 110 S. Ct. at 1576.

In the instant case the post-judgment interest issue relates to attorneys' fees rather than damages. Petitioners disingenuously assert that "a holding that a party is entitled to attorney's fees is different from a judgment requiring that the party be paid a specific amount of fees." Cert. Pet. at 8. The "holding" to which petitioners allude is contained in the district court's February 24, 1986 *judgment* establishing respondents' entitlement to fees and ordering partial payment. App. C, Pet. App. A-14. Aware that their *Bonjorno* argument crumbles in the face of this judgment, petitioners attempt to avoid acknowledging it. The Eighth Circuit, fully appreciative of *Bonjorno*'s judgment requirement, held that post-judgment interest accrued from the February 24, 1986 judgment.

Bonjorno said absolutely nothing about quantification or liquidation of the amount of the judgment. Indeed, petitioners' liquidation argument has been uniformly rejected in the context of post-judgment interest on damages judgments, the context in which *Bonjorno* was decided. Error as to the dollar value of a damages judgment is routinely held to be a matter of degree which, for purposes of determining the commencement of interest under §1961, does not undermine the basic integrity of the judgment. *E.g., Northern Natural Gas Co. v. Hegler*, 818

F.2d 730 (10th Cir. 1987), *cert. dismissed, Northern Natural Gas Co. v. Mobil Oil Corp.*, 486 U.S. 1063 (1988).[12]

In *Perkins* and *Copper Liquor* it was held that interest ran from the date of the original fees judgment, even though the fees awarded were reduced by the court of appeals in *Perkins* and increased by the court of appeals in *Copper Liquor*. The benchmark for post-judgment interest on the fees award was the date of the judgment establishing the plaintiffs' entitlement to fees, and not the date the final, corrected dollar amount was determined on appeal. In the instant case, respondents' February 1986 fees judgment was never appealed; post-judgment interest necessarily commenced to accrue upon its entry.

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[12] Were quantification or liquidation the key, as petitioners contend, the verdict in *Bonjorno* would have been sufficient to commence the accrual of interest under §1961. Indeed, after all appeals, the final judgment reinstated and affirmed the original jury verdict and judgment.

Bonjorno relied principally upon the Tenth Circuit decision in *FDIC v. Rocket Oil Co.*, 865 F.2d 1158 (10th Cir. 1989). 110 S. Ct. at 1576. The Tenth Circuit held that while *Northern Natural Gas* stated the generally applicable post-judgment interest principles in cases where damages were reversed on appeal, it was not applicable when the appeals court "completely reversed the district court's determination of liability and substantive rights of the parties." *Rocket Oil*, 865 F.2d at 1161.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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